NO. COA01-438

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

STATE OF NORTH CAROLINA

v. Guilford County
No. 00 CRS 87331

CHRISTOPHER CHARLES BROWN,
Defendant-Appellant.

Appeal by defendant from judgment entered 26 October 2000 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 14 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Richard J. Votta, for the State.

Walter L. Jones for defendant-appellant.

BRYANT, Judge.

Defendant appeals his conviction for robbery with a firearm. We find no error.

Sejui D'Almeida testified that he was robbed of his wallet at gunpoint at an ATM machine on West Market Street in Greensboro, North Carolina on the night of 25 April 2000. While he was using the ATM, a car containing three men arrived. Two men stepped out of the car and waited for him to complete his transaction. As D'Almeida walked back to his car, the men approached him. One opened the front passenger's side door to D'Almeida's car and sat

down inside; the second told D'Almeida, "Get in your car. Get in your car." When D'Almeida sat down in the driver's seat, the man sitting next to him drew a small black handgun. The man standing outside by D'Almeida's door demanded D'Almeida's wallet. D'Almeida surrendered the wallet, and the two men returned to their car. They followed D'Almeida briefly down West Market Street before turning left onto Edwardia Street. D'Almeida drove to a convenience store and called the police.

Greensboro Police Officer Bateman testified that he was dispatched to respond to D'Almeida's call. D'Almeida told Bateman that he was robbed by two men in a "white hardtop sport[] utility vehicle" (SUV). Police soon located a vehicle matching the description. Bateman drove D'Almeida to Mosby Drive, where he identified the vehicle and the driver, Aubrey Gorham, as involved in the robbery. Police found loose .22 caliber bullets and a box of bullets in the vehicle. Gorham told police that he had recently dropped off Zavandah Barnes and another man. Police found Barnes "pacing up and down" on High Point Road approximately fifty yards from where they had stopped the white vehicle. Defendant was subsequently found walking in the rain down High Point Road and was taken into custody. Defendant gave a statement admitting his participation in the robbery. Specifically, he stated he "came up behind [D'Almeida] on the driver's side" and asked for his wallet. He drew police a map to show where he had discarded his handgun, near Auto Masters on High Point Road. Defendant emphasized to police that the gun had been unloaded. The following day, police

recovered a silver-colored handgun from the location.

Defendant testified that he, Barnes and Gorham had driven from Danville, Virginia to Greensboro hoping to borrow rent money from a friend. Defendant brought his .32 caliber chrome pistol with him to serve as collateral for the loan. After they were unable to locate the friend, Barnes informed defendant that they did not have enough gasoline to make it back home. To resolve this problem, they decided to commit the robbery. Defendant stated that he and Gorham had exited their vehicle at the ATM machine and waited for D'Almeida. Gorham sat down in D'Almeida's passenger seat, while defendant stood at the driver's side door. Defendant told D'Almeida, "Calm down. Take a seat[,]" and then demanded his wallet. He then told D'Almeida to drive away. Defendant insisted he had left his gun in the SUV during the robbery and that he told police in his statement that he had not used the gun to rob D'Almeida. Although defendant did not believe Gorham had a gun, he admitted he did not see what had transpired in D'Almeida's car.

The State re-called D'Almeida to ask him about the silver-colored gun. He repeated that the robber who sat down in his passenger's seat had a black gun. However, he affirmed he had no doubt that the man had pointed a gun at him. D'Almeida clarified that he had not seen a gun on the man who stood at his car door and demanded his wallet.

Defendant first challenges the trial court's denial of counsel's motion to withdraw and defendant's request for replacement counsel. In support of his motion to withdraw, counsel

explained to the trial judge that defendant was dissatisfied with his opinion regarding the likely outcome of a trial. Counsel briefly summarized the State's evidence, including defendant's inculpatory statement to police and the directions he provided which led police to his discarded handgun. Despite this evidence, defendant had rejected counsel's advice to accept a State's offer to plead guilty in exchange for a mitigated sentence. Counsel further reported that defendant's father believed his son should be allowed to plead guilty to common law robbery and receive probation, rather than active imprisonment. Feeling that counsel had failed his son, defendant's father lunged at counsel in the courtroom hallway and had to be restrained. Counsel expressed concern for his physical welfare if he continued to represent defendant.

Defendant told the court that he did not believe counsel had spent sufficient time on his case to successfully "exonerate" him at trial. When pressed by the court about what information counsel had failed to learn, defendant explained that he was guilty of common law robbery but not armed robbery, because he had left his handgun in the SUV during the incident.

The court denied the motion to withdraw, finding it was brought "too close in time for trial[.]" The court further found that counsel was "a capable and competent attorney who zealously represents his clients." The court gave defendant the option of continuing with counsel's representation or dismissing counsel and representing himself. The court advised defendant against self-

representation but emphasized "that is a right you have to proceed to trial [by] representing yourself." Defendant chose to proceed to trial with his counsel. The court ordered defendant's father not to "threaten, harass, assault or even communicate" with counsel or come within fifty yards of counsel outside of the courtroom.

An additional disagreement surfaced during the trial when counsel notified the court, outside the jury's presence, that defendant wanted to testify. Counsel stated that he had advised defendant not to testify and expressed to the court his concern that defendant might not tell the truth. The court explained to defendant the potential advantages and disadvantages of testifying but made clear the decision was his. After a recess, defendant informed the court that he wanted to testify. Counsel performed both a direct and re-direct examination, allowing defendant both to deny using his firearm in the robbery and to explain the presence of the bullets found in the SUV.

In assigning error to the denial of counsel's motion to withdraw, defendant asserts that counsel's urging of a guilty plea, his concession that the State had a "slam dunk" case, and his fear of defendant's father were "entirely inconsistent with the duty of zealous representation." Defendant cites counsel's unwarranted belief that he would commit perjury as evidence of the lack of communication between them. Finally, he characterizes counsel's performance at trial as "perfunctor[]y" and concludes that "a bit more zealous, positive attitude" from counsel might have resulted in a conviction for the lesser offense of common law robbery.

Under N.C.G.S. § 15A-144 (1999), "[t]he court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause." However, "[i]n order to establish prejudicial error arising from the trial court's denial of a motion to withdraw, a defendant must show that he received ineffective assistance of counsel." *State v. Thomas*, 350 N.C. 315, 328-29, 514 S.E.2d 486, 495, *cert. denied by Thomas v. North Carolina*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). Such a showing requires proof both that counsel's performance fell below an objective standard of reasonableness and that this deficiency was so severe as to create a reasonable probability that it adversely affected the outcome at trial. *See State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). An indigent defendant's right to appointed counsel "does not include the right to insist that competent counsel . . . be removed and replaced with other counsel merely because the defendant has become dissatisfied with his services." *State v. Robinson*, 290 N.C. 56, 66, 224 S.E.2d 174, 179 (1976). A disagreement between a defendant and his appointed counsel on matters of trial tactics does not necessitate counsel's replacement with a new attorney. *Id.*

Defendant has failed to establish ineffective assistance by his appointed counsel. The transcript reflects that counsel was actively engaged throughout the trial in the face of compelling evidence of defendant's guilt, including (1) defendant's statement to police admitting to the robbery and disclosing the location of his gun, (2) defendant's trial testimony admitting to the robbery,

(3) the police's recovery of defendant's handgun based on a map he drew the night of the robbery, and (4) D'Almeida's account of being robbed at gunpoint by the man seated in his car. Defendant offers no specific suggestion of how counsel should have conducted his defense, beyond displaying "a bit more zealous, positive attitude[.]" By his own admission, defendant's entire defense was that he did not use his gun and was thus guilty only of common law robbery. It seems clear from the State's evidence, however, that defendant was convicted based on Gorham's use of a gun, not his own. D'Almeida unequivocally testified that the gun was brandished not by defendant, who stood outside and demanded D'Almeida's wallet, but by the man who sat in his passenger's seat. Moreover, D'Almeida insisted that the gun used in the robbery was black, not silver or chrome as was defendant's gun. As the trial court instructed the jury, defendant was accountable for Gorham's acts during the robbery. *See State v. Joyner*, 297 N.C. 349, 357-58, 255 S.E.2d 390, 395-96 (1979).

Moreover, defendant has not alleged any facts reflecting a true conflict of interest limiting counsel's ability to represent him. In *State v. Robinson*, defense counsel moved to withdraw, informing the trial court that he believed defendant planned to call a witness who would offer perjured testimony. The court denied counsel's motion to withdraw and defendant's numerous requests for replacement of counsel. Instead, the court allowed counsel simply to call defendant's witness to the stand without questioning her. After the witness gave her account of events,

defendant was permitted to conduct a direct examination in counsel's stead. The Supreme Court upheld the denial of the motion to withdraw and for appointment of new counsel, finding that this dispute over tactics was a "conflict of wills" not a "conflict of interest" requiring counsel's replacement. Defendant was awarded a new trial, however, based on the trial court's failure to give defendant the option of dismissing his attorney and representing himself. *Robinson*, 290 N.C. at 63-64, 66-67, 224 S.E.2d at 175-76, 178-80.

As in *Robinson*, the disagreements between counsel and defendant regarding trial strategy did not amount to a conflict of interest. Although counsel advised defendant to plead guilty, he honored defendant's wishes to proceed to trial and was actively engaged in objecting to evidence and in cross-examining the State's witnesses. Similarly, counsel advised against defendant's desire to testify but honored his election to do so. As shown by *Robinson*, counsel's expression of concern that his client might give false testimony did not mandate his removal from the case. The transcript reflects no deficiencies in counsel's representation in this regard. Although he believed defendant was ill-served by taking the witness stand, counsel facilitated defendant's testimony through direct and re-direct examination designed to underscore defendant's claim that he did not use his gun in the robbery. Unlike the defendant in *Robinson*, defendant was given the option of dismissing his attorney and representing himself.

Contrary to defendant's claim, counsel never conceded

defendant's guilt in any relevant sense. Counsel did not disclose his opinion of the State's case or concede defendant's guilt to the jury. *See State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied by North Carolina v. Harbison*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). Counsel did encourage defendant to accept a plea offer prior to trial, believing the State had a "slam dunk" case. This belief was well-supported by the evidence and was borne out by the jury's verdict. In offering defendant a candid assessment of his case, counsel acted well within his role as advocate.

Finally, counsel's professed concern for his safety based on the threatening conduct of defendant's father did not, standing alone, compel his replacement. *See Thomas*, 350 N.C. at 328-29, 514 S.E.2d at 495. Absent a showing that counsel's concerns left him unable to carry out his duties in a competent manner, the trial court did not abuse its discretion by refusing to allow him to withdraw. *Id.* As discussed above, nothing in the trial transcript reflects any constitutional deficiencies in counsel's performance. we further note that the trial court took decisive action to keep defendant's father away from counsel.

In his second assignment of error, defendant faults the trial court for allowing police witnesses to testify about receiving defendant's name as a possible suspect in the robbery. The State responds that this evidence was offered not for the truth of the matter asserted, but to explain the officers' subsequent conduct in seeking out defendant. Because defendant admitted his

participation in the robbery to the jury from the witness stand, any error, if any, in admitting the testimony was completely harmless. *See State v. Lloyd*, __ N.C. __, __, 552 S.E.2d 596, 618 (2001).

No error.

Judges WYNN and THOMAS concur.

Report per Rule 30(e).